IN THE

Supreme Court of the United States

October Term, 1951

No. .....

ABRAHAM NEWMAN, *Appellant,*

vs.

ROBERT E. MURPHY, Warden of Auburn State Prison, Auburn, New York.

APPEAL FROM THE SUPREME COURT, COUNTY OF CAYUGA, STATE OF NEW YORK

BRIEF IN OPPOSITION TO A STATEMENT AND MOTION TO AFFIRM

To the Supreme Court of the United States and the Honorable Judges Thereof:

The motion to affirm, herein opposed, is not based on law or on a true interpretation of the law. Once again, your appellant is caught in a web of misrepresentation, and again a plea is made that the amended statute ameliorated petitioner's position.

In appellant's petition for leave to appeal one issue was presented, "that the amendment to Section 212 of the New York Correction Law was unconstitutional as to him."

Petitioner respectfully calls attention to a would be axiom and corollary on page 2 of respondent's motion to affirm.

1. "Prior to the amendments the appellant could only hope to be released from prison by an act of executive clemency on the part of the governor."
2. "It will be noted that Sections 212 and 223 of the State Correction Law, as they were at the time of appellant's conviction, specifically excluded a prisoner previously convicted of a crime punishable by imprisonment in a state prison, from the benefits of parole(?) therein provided."

And the conclusion followed:

"Thus it is apparent that the amendment of 1936 was not *ex post facto.*"

Since respondent's opposition appears to be based on the foregoing, your petitioner, shall now conclusively prove that the foregoing interpretations are false.

The N. Y. Correction Law is the law controlling the release of prisoners, and it is also the authority for the Board of Parole. Sections 210-223 (inclusive) pertain to parole from prisons.

Sections 210-212 as they read prior to the amendment of 1936:

Section 210. *Board of Parole; powers and duties.*

Subject to other provisions of law, the board of parole in the division of parole of the executive department shall be charged with the duty of determining what prisoners serving an indeterminate sentence in state prisons and the Elmira Reformatory, *may be released on parole and when and under what conditions.* • • •

Section 211. Pre-Parole Record.

Section 212. *Prisoners subject to parole.*

> Every person sentenced to an indeterminate sentence and confined in a state prison *who has never before been convicted of a crime punishable by imprisonment in a state prison,* when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole. The time of his release shall be discretionary with the board of parole, * * *

Section 210, granted the board of parole the powers to determine whom to release on parole and when and under what conditions. But, section 212, stated to whom that power could be applied, and specifically stated what group of prisoners was under the jurisdiction of the board of parole, "*indeterminate sentence men never before convicted of a crime punishable by imprisonment in a state prison*". Respondent, being aware of the foregoing, contends that there was no other provision for the release of prisoners, from prison, who were not under the jurisdiction of the board of parole. However, one finds that sections 230-242 dealt with the discretionary reduction of sentences and provided a statutory procedure wherein prisoners not subject to the jurisdiction of the board of parole would be released.

Section 230, paragraph 2.

> Every prisoner, confined in a state prison or penitentiary may in the discretion of the governor as hereinafter provided receive for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be con-

strued to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction.

Section 232. Monthly report of warden to governor.

* * * in all cases the report shall show the amount of reduction recommended, and the date of expiration of the term and, *in the case of prisoners not subject to the jurisdiction of the parole board, the date when he may be released, if such reduction be allowed.*

The foregoing two sections (230-232) are the prescribed statutory procedure of release to be applied to prisoners not subject to the jurisdiction of the board of parole, and that procedure is still in effect to-day, and being applied to all definite sentence prisoners who are granted a reduction of sentence. The only group of prisoners that cannot be released from prison through a statutory procedure, but must be granted executive clemency in order to be released, are those men commuted from a sentence of death and those that were sentenced to Natural Life (no minimum sentence specified).

Since the foregoing sections of the correction law were in force prior to the amendment of 1936, the conclusion must be that there was a statutory procedure wherein your petitioner would be released if he was granted a discretionary reduction of sentence, which reduction was granted to him. And the additional requirement under the amended statute in 1936 (sec. 212), wherein your petitioner has the additional burden of obtaining a second favorable decision from the board of parole in order to obtain his release is UNCONSTITUTIONAL since it is based on an *EX POST FACTO* LAW, which is forbidden by THE CONSTITUTION OF THE UNITED STATES, Article 1, Section 10, and by the decisions of this Honorable Court:

Lindsey v. Washington, 1937, 301, U. S. 397, 57 S. Ct. 797, 81 L. Ed. 1182.

and as in *re* Murphy, Circuit Court D. Mass. 1898, No. 1833.

> "In addition, the option whether or not to revoke the permit was vested in a single executive board, while, under the act of 1895, no permit can issue without the approval of two executive boards; the practical result of which is that, under the latter statute, the prisoner has the burden of securing a double approval before he can obtain his liberty."

Respondent contends that the governor's action in granting or denying a reduction of sentence as recommended to him, prior to the Laws of 1948, ch. 631, was an act of executive clemency. But, petitioner respectfully calls attention to the provision of section 232 of the Correction Law;

> Sec. 232. Monthly report of warden to governor.
>
> "• • • the warden or superintendent of each of the state correctional institutions and of each of the penitentiaries in this state shall forward to the governor through the department of correction a report, directed to him, of any prisoner whose terms may be diminished and who may be released the following month, by reason of the reduction of his or her sentence." • • •

that section specifically limited the governor's authority as to when he could act on the reduction of sentence, though he could act under the authority of the constitution at any time.

In view of the above and other restrictions placed on the governor by the Correction Law, the function of granting or denying a reduction of sentence by authority of the Correction Law cannot be deemed to be an act of grace, wherein one acts without any statutory limitation. The laws of 1948 have transferred the duty, from the governor to the prison boards, of granting reduction of sentences and the governor is no longer concerned with that task, that change in itself shows that the legislature had never considered the governor's action under the Correction Law, as an act of grace.

Since the motion to affirm was based on the plea that the amendment to section 212 was not unconstitutional, and nothing was shown wherein this Honorable Court had no jurisdiction to resolve the constitutional question presented, that motion should be dismissed, and the decision of the Special Term be reversed.

Your appellant has prosecuted this cause without the assistance of counsel, and has prepared all Briefs and Motions presented to the courts, however, he has had the aid and comfort from the knowledge that his cause was just, and that justice will triumph in the end. But more important were the comfort that he gained from the words of the Hon. Justice Black:

> "Under our Constitutional system, courts stand against any winds, which blow as havens of refuge for those who might otherwise suffer because they are weak, helpless, outnumbered or because they are nonconforming victims of prejudice and public excitement."

Respectfully submitted,

ABRAHAM NEWMAN, *Appellant,*
In Propria Personna,
135 State Street,
Auburn, New York.

Dated: April , 1952.